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ATTORNEYS FOR IDAHO GROUND WATER APPROPRIATORS

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF A&B IRRIGATION DISTRICT FOR THE DELIVERY OF GROUNDWATER AND FOR THE CREATION OF A GROUND WATER MANAGEMENT AREA	DOCKET NO. 37-03-11-1 REPLY IN SUPPORT OF IGWA AND POCATELLO'S JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW the Idaho Ground Water Appropriators, Inc., and its Ground Water District members, for and on behalf of their respective members (collectively "IGWA") and the City of Pocatello ("Pocatello"), through counsel, and hereby submits this *Reply in Support of IGWA and Pocatello's Joint Motion for Partial Summary Judgment*.

INTRODUCTION

The Director's January 29, 2008 Order found that A&B Irrigation District ("A&B") was not suffering material injury to water right no. 36-2080 because, on a project-wide basis, 0.73 miner's inches/acre on average was being delivered to each of the acres within the A&B system. The Director reviewed the A&B partial decree, underlying license, and subsequent transfer, as well as various A&B and Bureau of Reclamation historical documents containing information regarding delivery amounts and the intended operation of the District. These documents allowed the Director to conclude that the proper basis for analyzing the adequacy of A&B's ground water supplies was on a project-wide basis because its water right is appurtenant to all lands within the District. On a project-wide basis, the Director conducted his inquiries under the Conjunctive Management Rules and concluded there was no injury to A&B's water rights. The question posed by IGWA and Pocatello's Joint Motion is whether the Director adopted the proper legal framework—a system-wide analysis based on decreed terms—to evaluate the claims of injury.

A&B's Response to Joint Motion for Partial Summary Judgment ("A&B Response") is not fully responsive to IGWA and Pocatello's arguments. A&B argues that because its wells are not receiving the full decreed amount of 0.88 miner's inches/acre, its means of delivery are being interfered with by junior pumping. *See* A&B Response at 10-11. In fact, A&B appears to claim that its point of diversion is the historic water table and that lowering of the water table alone is injury and an "unauthorized change in diversion." A&B Response at 14. Insofar as A&B's argument assumes the predicate—that A&B is injured if its wells do not pump the full decreed amount of water right no. 36-2080—this argument does not support a finding that the Director erred in analyzing injury on a system-wide basis but appears instead to be re-argument of the Motion for Declaratory Order.

A&B's Response altogether avoids the question of how the Director erred in relying on the appurtenance provisions of the partial decree as the framework of his injury analysis. Further, A&B does not explain why it would not have been an abuse of discretion for the Director to ignore the decree and rely instead on A&B's well system-by-well system analysis. As such, IGWA and Pocatello respectfully request that the Hearing Officer enter an Order confirming that the Director had the discretion to evaluate A&B's water right as decreed and that he used the proper legal framework in analyzing A&B's water right injury in the January 29, 2008 Order.

I. THE QUESTION POSED BY IGWA AND POCATELLO'S JOINT MOTION IS WHETHER THE DIRECTOR PROPERLY EXERCISED HIS DISCRETIONARY AUTHORITY BY EVALUATING A&B'S CLAIMS OF INJURY TO ITS WATER RIGHT

A&B spends much of its Response brief arguing, by reference to the testimony of various IDWR employees, that the Director was provided adequate information to do a well system-by-well system analysis of A&B's delivery call but failed to do so. A&B Response at 2-9. Whether IDWR had the information A&B references is irrelevant. None of the IDWR witnesses testified that the analysis conducted for the January 29, 2008 Order was chosen because of an absence of data or information. Instead, the analysis underlying the Order properly assumed that water right no. 36-2080 allowed the distribution of water from any of the points of diversion to any of the acres. *See, e.g.*, Conclusions of Law 23 and 24. The only question, as posed by IGWA and Pocatello's Joint Motion, is whether or not the framework selected by the Director was correct as a matter of law given the terms of the A&B partial decree, underlying license and subsequent transfer.

II. THE DIRECTOR DEVELOPED THE PROPER LEGAL FRAMEWORK FOR THE JANUARY 29, 2008 ORDER, THEREFORE THE ORDER IS CORRECT AND A&B HAS NOT SUFFERED INJURY

A&B's Response brief continues at pages 11-15 with several arguments: first, that junior ground water pumping is unlawfully resulting in "interference with a senior water right holder's point of diversion," and second, that under *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933) and *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982), any changes A&B must make to its system to facilitate delivery of water under its partial decree must be paid for by juniors. Neither of these arguments effectively demonstrates error on the part of the Director in assuming a system-wide analysis for his determinations of non-injury to water right no. 36-2080.

A. There is no interference with a point of diversion absent a showing of water right injury or actual physical taking of the point of diversion.

A&B's argument starts from the premise that, if some of its wells are unable to keep up with peak season demand, this must be the fault of junior ground water diversions and those diversions therefore amount to "interference" with its point(s) of diversion. A&B Response at 11. To date, at least, A&B's claims founder on the law of the case. The Director found no injury to A&B's water right in the January 29, 2008 Order because the Director found there to be no shortage on a system-wide basis. Under Idaho law, it is not clear that A&B can make out a claim for "interference" with its point of diversion if there is no shortage. While A&B cites *Noh v. Stoner* and *Parker v. Wallentine* in defense of this argument, the Hearing Officer has already determined that these cases are not applicable to A&B's delivery call. Order Regarding Motion for Declaratory Hearing, May 28, 2008 at 3-5. *Noh v. Stoner,* 53 Idaho 651, 26 P.2d 1112 (1933) was overruled by the adoption of section 226 of the Ground Water Act and *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973); *Parker v. Wallentine,* 103 Idaho 506, 650 P.2d 648 (1982) is limited to disputes involving domestic wells. *See* Order Regarding Motion for

Declaratory Ruling, May 28, 2008 at 3-5. To the extent ground water levels have declined causing A&B to reconfigure well delivery systems to enhance delivery flexibility, this does not raise a colorable claim of "injury" or "interference" under Idaho law. *Cf.* A&B Response at 11-15.

A&B also refers to *Randall Canal Co. v. Randall* ("*Randall Canal*"), 56 Idaho 99, 50 P.2d 593 (1935), which involved the efforts of a canal company to reconfigure part of its delivery system to facilitate its operations. *See* A&B Response at 12. In *Randall Canal,* the result of such reconfiguration would have been to leave a farmer without a delivery system for some of his lands, or at least to make it more difficult to serve his lands with the remaining diversion structure (the facts of the case are not clear on this point). *Randall Canal*, 56 Idaho at 99, 50 P.2d at 593 ("The evidence shows it to be to the advantage of appellant to close headgates numbered 2 and 3 and to deliver all the water for the irrigation of respondent's farm through headgate numbered 1.")[1] The situation in *Randall Canal*, which is distinguishable from the case at hand, would be analogous to A&B informing some of its shareholders in the corners of its project that it was eliminating their delivery systems because it was just too costly to get water to those lands. Under such circumstances A&B shareholders could rightly claim "interference" with their delivery systems—interference in the sense of being physically eliminated.

By contrast, in this case A&B has alleged it is injured because, on a project-wide basis, its wells cannot deliver .88 miner's inches/acre. Unlike the farmer in *Randall Canal,* who would have been without two of his three headgates—all of which he constructed prior to the formation

[1] The facts in *Randall* are also distinguishable because it appears that the farmer (Randall) actually built the conveyance structures, and subsequently the canal company was formed and used those structures. *Id.* In the case of A&B, the wells in question were built by the Bureau of Reclamation for the purpose of serving the District, and there is no evidence disclosed to date that A&B water users have any kind of pre-existing right to any of the A&B wells based on private efforts to construct the wells.

of the canal company—A&B's farmers currently receive water through their well systems.[2] Whether they are injured unless they receive 0.88 miner's inches/acre (the rate at which the full decreed amount under water right no. 36-2080 could be delivered through each of A&B's wells) is a *factual* question for hearing. A&B cannot bootstrap its injury arguments by suggesting that its means of diversion is being interfered with simply because it cannot deliver its full decreed amount on a project-wide basis through each of its well systems.

B. The Director's analysis (and IGWA and Pocatello's Motion) relied on the plain language of A&B's partial decree. A&B has wholly failed to refute that interpretation in its Response.

IDWR's authority to respond to a call arises in part from the terms and conditions of the water right itself. A&B does not explain, by reference to the partial decree or a subsequent transfer that insured A&B maximum flexibility under its water right, how the Director erroneously interpreted the decree terms in assuming that ground water pumped from any point of diversion is appurtenant to any lands in the A&B system. In fact, in its Response, A&B admits that "A&B's water right has multiple points of diversion, and is appurtenant to all acres…" A&B Response at 10. In light of these circumstances it would be improper to analyze the delivery call on a well system-by-well system basis.

Importantly, Conjunctive Management Rule 42 requires the Director to evaluate the amount of water in the source along with the effort or expense of A&B to divert water from the source. *See* CM Rule 42.01.a.and b. A&B suggests instead that the Director's analysis should have proceeded based on the current physical configuration of the project and that any evaluation of the amount of water in the source and its delivery system under the Conjunctive Management

[2] There are several well systems in the southwest corner of the project that are now served by surface water rather than ground water.

Rules, which the Director applied in this case, is incorrect. Under this theory, argues A&B, the Director should have evaluated injury on the basis of deliveries from each of the 138 well systems because A&B has already interconnected some of its 177 wells; however, it would not be appropriate to evaluate injury on the basis of an assumption that additional well systems could be interconnected to deliver water to any lands that A&B believes to be short throughout its 62,604-acre place of use.

A&B's own activities to interconnect nearly 25% of its total wells (approximately 40 of 177 wells)[3] show that it understands and appreciates the flexibility built into its license and decree by a forethoughtful Bureau of Reclamation and enlightened District management. Why it now turns to juniors to pay for these improvements is baffling and, more importantly, without legal basis. Further, under A&B's theory, if just one of its wells is unable to pump .88 cfs, then A&B is entitled to curtail all junior ground water pumping, regardless of whether that well could be rehabilitated or interconnected with a neighboring well. This theory totally disregards Idaho's Ground Water Act, which tempers the first in time first in right principle with full economic development of the State's under ground water resources.

If IDWR had analyzed A&B's delivery call in the manner called for by A&B's Response it would have abused its discretion. The January 29, 2008 Order properly declined to look at the delivery call on a well system-by-well system basis. To the extent A&B could satisfy its water demands by modest changes (not moving "all the wells to new locations," as A&B suggests at page 12 of the Response) to further interconnect its system, any shortage is caused by its own planning failures rather than junior ground water pumping.

[3] A&B Irrigation District Expert Report dated July 16, 2008, table 4-2 at page 4-33.

CONCLUSION

A&B has provided no legal authority for the proposition that the Director selected an erroneous legal framework for the injury analysis conducted in the January 29, 2008 Order. As such, IGWA and Pocatello respectfully request that the Hearing Officer GRANT the Motion for Summary Judgment.

Respectfully submitted this 29th day of October, 2008.

RACINE, OLSON, NYE, BUDGE &
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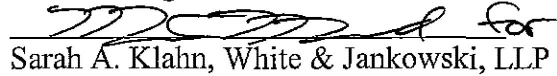
CERTIFICATE OF SERVICE VIA E-MAILING / MAILING

I hereby certify that on this 29th day of October, 2008, a copy of **Reply In Support Of IGWA And Pocatello's Joint Motion For Partial Summary Judgment** in the **Petition for Delivery Call of A&B Irrigation District** was served by email and/or by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:



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